NO. 09-35818

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON,

Plaintiffs/Appellees,

v.

SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,

Defendants/Appellants.

On Appeal From The United States District Court
District Of Washington, At Tacoma

No. C09-5456BHS
The Honorable Benjamin H. Settle
United States District Court Judge

APPELLANTS' EMERGENCY MOTION UNDER 9TH CIR. R. 27-3

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9TH CIR. R. 27-3 CERTIFICATE

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2. Nature Of The Emergency

Under the Washington Constitution, a referendum may be ordered on a bill passed by the legislature, if a petition signed by a constitutionally specified percentage of legal voters is filed with the Secretary of State (Secretary). When a petition containing the signatures of the requisite percentage of legal

voters is filed, an election is held in which the voters decide whether to accept or reject the bill. The Washington Legislature enacted Engrossed Second Substitute Senate Bill (E2SSB) 5688, which expanded the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners. Protect Marriage Washington filed Referendum Measure 71 (Referendum 71) to challenge E2SSB 5688. The referendum petition had about 122,000 valid signatures and will be placed on the November 3, 2009 general election ballot.

Under Washington's Public Records Act, the Referendum 71 petitions are public records and, accordingly, may be made available for public inspection. Wash. Rev. Code § 42.56.070. Protect Marriage Washington and two John Doe plaintiffs filed this action to enjoin the Secretary from providing Referendum 71 petitions containing the names and addressers of petition signers in response to a public records request. The plaintiffs claimed that providing these petitions would violate their rights of association under the First Amendment of the U.S. Constitution. The District Court granted plaintiffs' motion for a preliminary injunction on September 10, 2009. The Secretary filed the Preliminary Injunction Appeal, the Representation Statement, and the Civil Appeals Docketing Statement on September 11, 2009.

Under the Public Records Act, Washington citizens are entitled to view the names of the individuals who signed Referendum 71 petitions before the November 3 election. This is the time in which the information is most relevant, and the public will suffer irreparable injury if the information is not disclosed before the election.

The Secretary seeks a stay of the preliminary injunction so the petitions can be released prior to the election or, if the court denies a stay, expedited handling of the Secretary's appeal so it will be resolved as soon as possible before the November 3 election. The Secretary proposes the following briefing schedule, with oral argument and a decision by the Court, as soon as possible, after the briefing is completed.

Brief of Appellant filed……September 18, 2009

Excerpts of Record filed……September 18, 2009[1]

Brief of Appellee filed……..September 25, 2009

Reply Brief of Appellant filed……September 30, 2009

[1] No testimony was taken at the hearing before the District Court. For this reason, appellants do not intend to order a transcript and will file and serve the statement required by 9th Cir. R. 10-31(a).

Based on this 17-day briefing schedule, Washington voters suffer irreparable harm if relief is not granted within 21 days. Therefore, this motion falls within the requirements for an emergency motion under 9th Cir. R. 27-3(a).

3. Notification Of Counsel

On September 14, 2009, Deputy Solicitor General James K. Pharris called each of the law firms representing parties in the case and informed them that this motion would be filed today. Mr. Pharris had telephone conversations with: Stephen Pidgeon, representing the Plaintiffs below (John Doe #1 and #2 and Protect Marriage Washington): Scott F. Bieniek, also representing the Plaintiffs; and Steven J. Dickson, representing Intervenor Washington Coalition for Open Government. Mr. Pharris left a voicemail message for Kevin Hamilton, representing Intervenor Washington Families Standing Together. After making the phone calls, Mr. Pharris sent an electronic mail message to all of the counsel listed in Part 1, above, transmitting the same information as was contained in the telephone calls. A copy of the motion will be served on the parties' attorneys when it is filed with the Court.

4. Proceeding In The District Court

The District Court has the authority to stay the preliminary injunction it issued. The Secretary did not seek a stay from the District Court for two

reasons. First, having granted the preliminary injunction on September 10, 2009, it would be futile to ask the District Court to stay the injunction on September 11 or 14. Second, and more important, a motion in the District Court would have delayed proceeding in the Ninth Circuit. Even with filing the appeal on Friday, September 11, and this motion on Monday, September 14, there is very little time to resolve this case before the November 3 election so that Washington voters will have the benefits of the information sought before the election. Seeking a stay from the District Court would have consumed a substantial portion of that time.

Finally, the District Court does not have the authority to grant expedited consideration of this case in the Court of Appeals. Such a request only may be made in this Court.

I. MOTION FOR STAY OF PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, EXPEDITED REVIEW

Appellants, move under Fed. R. App. P. 8(a)(2) for a stay of the preliminary injunction issued by the District Court to prevent the Secretary of State (Secretary) from providing signed Referendum 71 petitions to persons who have requested them under Washington's Public Records Act. In the alternative, Appellants, move for expedited review so this case can be resolved before the general election to be held on November 3, 2009.

II. STATEMENT OF THE CASE

In the state of Washington, laws may be enacted in either of two ways: through the acts of the state's elected legislature, or directly by the people through the use of the initiative and referendum powers. Under the state constitution, a referendum "may be ordered on any act, bill, law, or any part thereof passed by the legislature", with exceptions not at issue in this case. Wash. Const., art. II, § 1(b). If constitutionally established prerequisites for a referendum election are met, then the electorate votes on whether to accept or reject the bill passed by the legislature. *Id.*

In order for the public to trigger the referendum process, the state constitution requires the filing of petitions with the Secretary that contain the valid signatures of a specified number of Washington registered voters.

On July 25, 2009, the proponents of Referendum 71 submitted 9,359 signature petitions to the Secretary. Decl. of Catherine Blinn, ¶ 3, Ex. A (Aug. 14, 2009) (Appendix A). Referendum 71 asks voters to either accept or reject Engrossed Second Substitute Senate Bill 5688, passed by the 2009 Legislature, relating to the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners. Decl. of Nick Handy, ¶ 4 (Aug. 12, 2009) (Appendix B). Pursuant to Wash. Rev. Code § 27A.72.130, the signers of Referendum 71

> *order and direct that Referendum Measure No. 71 . . . shall be referred to the people of the state for their approval or rejection at* the regular election to be held on the *3rd day of November, 2009*; and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

See also Decl. of Catherine Blinn, ¶ 3-4 (Aug. 14, 2009) (Emphasis added). As required by Wash. Rev. Code § 29A.72.140, the signature petition also contains a warning that:

> Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by a fine or imprisonment or both.

The Referendum 71 signature petitions were delivered in an open, public forum. Decl. of Nick Handy, ¶ 6 (Aug. 12, 2009). Referendum supporters and opponents were in attendance, as were several members of the news media. *Id.* The staff at the Secretary's Office counted and verified the signatures on the petitions in order to determine whether enough registered voters signed the petitions to qualify Referendum 71 for the November, 2009 election ballot. *Id.* ¶ 8. Representatives of organizations supporting and opposing the measure observed this process. On September 2, 2009, the Secretary of State formally certified Referendum 71 to the ballot, determining that the petitions had more than the required number of valid signatures of registered voters.

Washington also has a public disclosure law (referred to in this motion as the Public Records Act or Act) that generally makes all public records available for public inspection and copying. Wash. Rev. Code § 42.56.070. The term "public record" is defined as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency." Wash. Rev. Code § 42.56.010(2). Referendum petitions filed with the Secretary of State meet this definition, as they must be submitted to the state, and are used by the state to determine whether a referendum petition is

supported by the requisite number of valid signatures of Washington voters to qualify the measure to the ballot. Wash. Rev. Code. § 29A.72.230. Although the Act exempts a number of specific categories of records from public disclosure (*see, e.g.*, Wash. Rev. Code §§ 42.56.210-.480), none of the exemptions apply to referendum petitions.

On July 28, 2009, Plaintiffs filed this action, challenging the constitutionality of Washington's Public Records Act on the theory that it violates their First Amendment rights by making the signed referendum petitions available upon request. The Plaintiffs seek to enjoin the Secretary from releasing to the public any information revealing the names of persons who sign referendum petitions, including petitions for Referendum 71. Shortly after Plaintiffs filed this action, the Secretary received several public records requests for the names of the individuals who signed Referendum 71. Decl. of Nick Handy, ¶ 9 (Aug. 12, 2009). On September 3, 2009, the District Court held a hearing on Plaintiffs' motion for a preliminary injunction. No testimony was taken at the hearing. On September 10, 2009, the District Court granted the motion. (The District Court's Order Granting Plaintiffs' Motion for Preliminary Injunction (Order) is attached as Appendix C). On September 11,

2009, the Secretary filed the Preliminary Injunction Appeal, the Representation Statement, and the Civil Appeals Docketing Statement.

III. ARGUMENT

A. Standard of Review

The District Court's grant of a preliminary injunction is reviewed under the abuse of discretion standard. *Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 901 (9th Cir. 2007). A preliminary injunction based on an erroneous legal standard or clearly erroneous factual findings is an abuse of discretion. *Id*. at 901 (*citing Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). A preliminary injunction is premised on an erroneous legal standard if "(1) the court did not employ the appropriate legal standards that govern the issuance of a preliminary injunction; or (2) in applying the appropriate standards, the court misapprehended the law with respect to the underlying issue in the litigation." *Freecycle*, 508 F.3d at 902 (*citing Clear Channel*, 340 F.3d at 813).

In this case, the District Court applied the improper standard in its First Amendment analysis. The District Court erroneously treated voters' signatures, names, and addresses on referendum petitions filed with the State as anonymous political speech. As a result, the District Court erroneously

analyzed Washington's Public Records Act under standards applicable to laws that compel disclosure of anonymous political speech. Because of this fundamental error, the District Court did not properly evaluate any of the standards that a court must consider in determining whether to grant preliminary injunctive relief.[2]

The District Court erroneously analyzed Plaintiffs' likelihood of success on the merits of their First Amendment claim, erroneously presumed irreparable harm, did not properly balance the hardships between the parties, and did not properly consider the public interest. When the correct constitutional analysis is applied, Plaintiffs cannot demonstrate a likelihood of success on the merits of their First Amendment claim and cannot otherwise satisfy the standards for injunctive relief.

B. The District Court's First Amendment Analysis And Resulting Preliminary Injunction Order Are Fundamentally Flawed

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[2] A preliminary injunction "is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, ___ U.S. ___, 129 S. Ct. 365, 376, 172 L. Ed. 2d 249 (2008). In exercising their sound discretion, courts of equity should "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 376-77 (citations omitted). A plaintiff seeking a preliminary injunction must establish "that he is likely to succeed on the merits [of his claim], that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374 (citations omitted).

1. The District Court Erroneously Assumed That Referendum Petitions Submitted To The State Are Anonymous Political Speech

The District Court evaluated Plaintiffs' likelihood of success on the merits of their First Amendment challenge to Washington's Public Disclosure Act based on the fundamentally erroneous assumption that the political speech at issue in this case–signatures, names, and addresses on Referendum 71 petitions–constitutes anonymous political speech. "The type of free speech in question is anonymous political speech." Order at 9. Based on this erroneous and unexplained premise, the District Court evaluated Plaintiffs' First Amendment challenge to Washington's Public Records Act as though it compels disclosure of anonymous political speech, when it does not.

The District Court's conclusion that signed Referendum 71 petitions are anonymous political speech cannot withstand scrutiny. This fundamental error infected the entirety of the District Court's analysis, and it alone accounts for the District Court's Order. Indeed, apart from this fundamentally flawed analytical framework, the District Court offered no rationale for its Order. There is no rationale for such an order in this case.

Under constitutional and statutory provisions that govern Washington's referendum process, *laws that Plaintiffs do not challenge*, a Washington voter

who wishes to support a referendum petition must sign the referendum petition, and print his or her name, town or city and county of residence on the petition. Wash. Rev. Code § 29A.72.130. In other words, to petition for a referendum, a Washington voter must disclose his or her identity as part of the petitioning process. Absent identifying himself, a voter cannot petition for a referendum election, and a referendum cannot qualify for the ballot. In other words, the voter cannot petition for a referendum election anonymously.

This is so because under the Washington Constitution and election statutes (*laws that Plaintiffs do not challenge*), a referendum election initiated by voter petition may be held *only if* a constitutionally established percentage of lawful voters petition for the election. Wash. Const. art. II, § 1(b). In order for the State to verify whether a referendum petition is supported by the requisite number of lawful voters, referendum petitioners must disclose their identities. Wash. Rev. Code §§ 29A.72.130, .150, .230. Only with that identifying information may the Secretary compare the signatures of the petition signers with the State's database of lawfully registered voters, and thereby determine whether a referendum measure qualifies for the ballot. In short, the identity of referendum petition signers must be disclosed in order for the State to determine whether the threshold of voter support required for a

referendum election is met. In the case of Referendum 71, the sponsor was required to collect and submit this information to the Secretary of State from 120,577 Washington registered voters.

As the redacted Referendum 71 petition filed in the District Court demonstrates, persons signing referendum petitions are personally directing the Secretary of State, a government official acting on behalf of the people of Washington, to place the referendum measure on the ballot. Wash. Rev. Code § 29A.72.130; Blinn Decl., Ex. A. In addition, referendum petitions advise persons who sign them that knowingly providing false identifying information is a crime. *Id.* In other words, persons who sign referendum petitions are made fully aware that the petitions, which include the signers' signature, printed name and residence, and direction to the Secretary, are disclosed to the government. They are disclosed to the Secretary who acts on behalf of Washington's citizens to determine whether there is sufficient support among Washington's registered voters to send the measure to a vote, and they may be referred to law enforcement officials, who also act on behalf of the people of Washington, to evaluate whether the petition signer has engaged in criminal misconduct. Petition signers thus know that they have disclosed their identity to the government as part of their political speech seeking a referendum

election. *This speech is not anonymous, and the record of this speech, the signed petitions, is precisely what requesters have sought under Washington's Public Records Act.*

Moreover, as the redacted Referendum 71 Petition filed in the District Court demonstrates, persons who sign referendum petitions also disclose their signatures, names, and addresses indicating support for the petition to members of the public. This includes disclosure to any person engaged in signature gathering. It also includes disclosure to the sponsor of the measure who files the petitions with the State. Wash. Rev. Code § 29A.72.150. It includes disclosure to whoever subsequently signs a signature petition sheet. As the redacted Referendum 71 petition demonstrates, the first signer on the petition sheet indiscriminately discloses his or her identity and support for a referendum election to as many as 19 other signers. Any signer also indiscriminately discloses his or her signature, name, and town or city and county of residence to an unlimited number of persons who peruse the petition in the signature gathering process, but who decide not to sign it. And nothing in Washington law precludes these persons from sharing this information with others.

Under these circumstances, it is simply untenable to conclude, as did the District Court, that Plaintiffs' challenge to Washington's Public Records Act concerns disclosure of anonymous political speech.

In the District Court's Order, the District Court cites cases recognizing that there is a right to anonymous political speech. Defendants do not take issue with this general proposition. Nor do Defendants take issue with the District Court's statement of the analysis that applies when a law that *actually* requires disclosure of anonymous political speech is challenged under the First Amendment. But these principles simply have no application to this case. The political speech at issue here, the referendum petitioners' demand that the Secretary place a referendum on the ballot, is not anonymous political speech. Under Washington laws previously discussed and not challenged by the Plaintiffs, a referendum petitioner must identify himself to the government and to others in the referendum process. This loss of anonymity necessarily precedes any request for signed referendum petitions under Washington's Public Records Act.

The District Court cites no authority for the untenable proposition that a person who discloses his identity to the government and to multiple private parties as part of engaging in political speech, nonetheless is engaged in

anonymous political speech. Such a conclusion turns the meaning of anonymous on its head. "Anonymous" means: "Having an unknown or withheld authorship." *American Heritage Dictionary*, New College Edition 54 (1982). The identity of persons who sign referendum petitions is known; indeed, it must be known in order to trigger the referendum process.

This basic and seemingly self-evident principle is supported in United States Supreme Court decisions concerning anonymous political speech. For example, in *Watchtower Bible and Tract Soc'y of New York, Inc., v. Village of Stratton*, 536 U.S. 150, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002), the question before the Court was the validity under the First Amendment of a village ordinance making it a misdemeanor to engage in door-to-door advocacy without a permit. *Id*. at 153. The Court observed that "there are a significant number of persons who support causes anonymously" and who would be "deterred from speaking *because the registration provision would require them to forgo their right to speak anonymously*." *Id*. at 166 n.14 (emphasis added). The Court explained that "[t]he requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity." *Id*. at 166. That disclosure of a speaker's identity to the government forecloses the

speaker's anonymity also is apparent from *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 599 (1999). In that case, the Court held that a Colorado statute requiring circulators of initiative and referendum petitions to wear an identification badge violated the First Amendment. In so holding, the Court relied in part upon the fact that Colorado's interest in identifying and prosecuting petition circulators who violated the law was adequately served by a state statute that required circulators to subsequently file an affidavit containing the circulator's name and address, and attesting to an understanding of and compliance with Colorado laws governing signature gathering. *Id*. at 196. The Court recognized that "the affidavit reveals the name of the petition circulator", a participant in political speech, "and is a public record." *Id*. at 198. Each of these cases thus supports the wholly unremarkable proposition that anonymity does not survive a law requiring disclosure of the identity of the speaker to the government.

For these reasons, the District Court erred in analyzing Plaintiffs' challenge to an entirely separate law, Washington's Public Records Act, as though the Public Records Act requires disclosure of anonymous political speech.

2. The District Court's Incorrect Assumption That Referendum Petitions Submitted To The State Are Anonymous Political Speech Caused It To Erroneously Apply Every Standard For Considering Whether To Issue A Preliminary Injunction

The District Court's faulty premise led it to hold that the Public Records Act withstands a challenge under the First Amendment only if it satisfies strict scrutiny. "[T]he government may infringe on an individual's right to free speech but only to the extent that such infringement is narrowly tailored to achieve a compelling state interest." Order at 12. The District Court then determined that the Act failed to satisfy this erroneous standard because it is not narrowly tailored to the State's compelling interest in protecting the integrity of referendum elections. Order at 15-16. On this basis, and only on this basis, the District Court concluded that Plaintiffs were likely to prevail on their First Amendment challenge to Washington's Public Records Act. However, no such strict scrutiny requirement applies to Washington's Public Records Act, because it does not compel disclosure of anonymous political speech.

The District Court's erroneous determination that Plaintiffs were likely to succeed on the merits of their First Amendment challenge–that Plaintiffs likely could show infringement of their First Amendment right to anonymous political speech led the District Court to *presume* irreparable harm in the

absence of preliminary injunctive relief. Order at 16. Based on its erroneous conclusion presuming irreparable harm to Plaintiffs, the District Court then stated that it was compelled to find that the equities tipped in Plaintiffs' favor. Order at 17. And the District Court's erroneous legal analysis and conclusion with respect to the Plaintiffs' likelihood of success on the merits just as assuredly led to error in considering whether the public interest supported preliminary injunctive relief.

3. Plaintiffs' Alternative First Amendment, As Applied Claim, Is Plainly Unsound And Cannot Support Preliminary Injunctive Relief

The District Court found it unnecessary to reach Plaintiffs' second claim for relief. Order at 16. "In Count II, Plaintiffs allege that the Public Records Act is unconstitutional as applied to Referendum 71 because 'there is a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment and reprisals.'" Order at 2, quoting Dkt. 2 at 10. This claim plainly fails.

Plaintiffs cannot shoehorn their circumstances into the narrow exemption from public disclosure recognized in cases such as *Nat'l Ass'n for the Advancement of Colored People* (NAACP) v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462-63, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), *Brown v.*

Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 103 S. Ct. 416, 74 L. Ed. 2d 250 (1982), and *Fed. Election Comm'n v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416 (2nd Cir. 1982) upon which they rely.

First, those cases all concern private organizations engaged in private organization activities that opposed government reporting requirements with respect to their private activities. In contrast, a citizen who signs a referendum petition is engaged in a public legislative process. "A referendum or an initiative measure is an exercise of the reserved power of the people to legislate[.]" *State ex rel. Heavey v. Murphy*, 138 Wash.2d 800, 808, 982 P.2d 611 (1999). As a petition signer, a citizen acts in a governmental capacity, joining with others to propose legislation for consideration by the electorate. The signer's act is inherently public. Plaintiffs have identified themselves in order to invoke a governmental public process and, having done so, now complain that the public should not be allowed to know who has triggered the process. There is no basis for extending the narrow First Amendment exemption developed in the case law, protecting the disclosure of the names of the members of organizations engaged in private activity, to the context of the public activity of signing a referendum petition to invoke a public legislative process.

Second, these cases all involve threats against groups which were (1) small in number; (2) espoused views which were far outside the mainstream in their community and in their time; and (3) demonstrated a pervasive history of threats and harassment by private parties and government. By contrast, Plaintiffs are not part of a small or even identifiable group. They are not known to have anything in common except that they individually signed petitions to place Referendum 71 on the ballot. There is no evidence that they constitute a small minority which has been marginalized or historically disadvantaged relative to their opponents or that by virtue of such a status, the purpose for which they have "associated"–to submit requisite signatures to place Referendum 71 on the ballot–has been thwarted. On the contrary, they have gathered sufficient signatures for Referendum 71 to qualify for the ballot, and they obviously hope that opponents of E2SSB 5688 will be in the majority in the November election. They present no evidence that their campaign is a futile effort by a disfavored minority group.

Third, in *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D.Cal. 2009), the court rejected the Plaintiffs' claim on basically the same evidence, concluding that in "light of clearly established precedent, this Court is unable to say that . . . the Plaintiffs' potential burden is even remotely

comparable [to that in *Brown*]." *Id.* at 1214. Simply put, the Plaintiffs in this case are not in the same position as the NAACP, the Socialist Worker's Party, or the Communist Party.

Fourth, Plaintiffs cannot demonstrate a reasonable probability of serious harassment, threats, or reprisals because their evidence is insubstantial. Plaintiffs' evidence consists primarily of 58 John Doe declarations that were filed in *ProtectMarriage.com*. In considering the declarations in *ProtectMarriage.com*, the court found that "[p]laintiffs' claim would have little chance of success in light of the relatively minimal occurrences of threats, harassment, and reprisals." *ProtectMarriage.com*, 599 F. Supp. 2d at 1216. According to the Court, the plaintiffs "cannot, allege that the movement to recognize marriage in California as existing only between a man and a woman is vulnerable to the same threats as were socialist and communist groups, or, for that matter, the NAACP." *Id*. The conclusions of the court in *ProtectMarriage.com* are equally applicable in this case. For all of these reasons, the preliminary injunction issued by the District Court should be stayed. Absent a stay, the important interests protected by Washington's Public Records Act will be lost with respect to Referendum 71.

C. THIS APPEAL SHOULD BE EXPEDITED SO THAT THERE WILL BE A DECISION IN ADVANCE OF THE NOVEMBER 3 ELECTION

If the Court does not stay the preliminary injunction, in the alternative, the Court should expedite this appeal on the schedule set out on page iv of the 9th Cir. R. 27-3 Certificate so that it may be resolved before the November 3 general election. There is good cause under 9th Cir. R. 27-12 to expedite this appeal. In the absence of expedited treatment, the voters of Washington will suffer irreparable harm. Referendum 71 will be on the ballot for the November 3 general election, yet information with respect to it will be denied to Washington voters. The Ninth Circuit has granted expedited review in cases involving elections. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003); *Daily Herald Co. v. Munro*, 758 F.2d 350 (9th Cir. 1984).

The Court should also expedite this case because the names on the Referendum 71 petitions are relevant to the election. Voters in a referendum election act as legislators—they will either accept or reject E2SSB 5688. The voters are entitled to know who is essentially lobbying for their vote and, thus, who likely will benefit from the measure. As the Court explained in *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105-07 (9th Cir. 2003),

"[v]oters act as legislators in the ballot-measure context, and interest groups and individuals advocating a measure's defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat legislation. We think Californians, as lawmakers, have an interest in knowing who is lobbying for their vote[.]"). While such information may not be determinative to a voter, it certainly is a factor that the electorate is entitled to take into account in deciding how to vote. However, it is only valuable to the voters if they have the information before the election. Failure to expedite this case will not render it moot. But voters will be permanently deprived of the information to which they are entitled at the time when it is most important. The Court should grant the motion to expedite.

IV. CONCLUSION

For the reasons stated herein, the Court should stay the preliminary injunction issued by the District Court. If the Court denies the stay, the Court should grant expedited review.

RESPECTFULLY SUBMITTED this 14th day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the state of Washington, that on this date I caused to be served Appellants' Emergency Motion Under 9th Cir. R. 27-3 with the Clerk of the Court using the CM/ECF System, which system will send notification of such filing to the following:

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DATED this 14th day of September, 2009.

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